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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 117.

EDWARD D. EGAN, APPELLANT,

vs.

JAMES T. CLASBEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 26, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1890.

a In the Supreme Court for Utah Territory.

EDWARD D. EGAN, Plaintiff and Appellant,
vs.
JAMES T. CLASBEY, Defendant and Respondent. } Judgment.

Transcript on Appeal.

Hall & Marshall, William Dickson, Sheeks & Rawlins, attorneys for appellant; Rosborough & Merritt, attorneys for respondent.

Filed January 24th, 1887.

E. T. SPRAGUE, *Clerk.*

1 In the Supreme Court of Utah Territory.

EDWARD D. EGAN, Appellant,
vs.
JAMES T. CLASBEY, Respondent.

Record on Appeal.

Complaint.

In the District Court of the Third Judicial District of Utah Territory.

EDWARD D. EGAN, Plaintiff,
vs.
JAMES T. CLASBEY, Defendant.

The plaintiff states that on or about the 11th day of September, 1885, he was the owner in and entitled to the possession of an undivided one-fourth of the Horn Silver and Bannock lodes, veins, and mining claims, bearing silver, and situated in Lava
2 Creek mining district, Alturas county, Idaho Territory, and said property, as between the plaintiff and defendant, at the dates hereinafter stated, was known and called the "Martin's Horn Silver mine."

That at said date, having in contemplation the formation of a corporation under the laws of this Territory and passing the title of said property to said corporation in payment of the stock subscribed by the incorporators thereof, the plaintiff and defendant entered into a contract by which the defendant paid to the plaintiff the sum of five thousand dollars, and in consideration of which the plaintiff agreed to deliver to the defendant stock in said property to the amount and value of $5,000, at its original cost, and if the stock should not be issued the plaintiff to execute and deliver to the defendant a deed for a portion of said property equivalent to stock of the amount of $5,000.

A copy of said contract is hereto attached as a part hereof, marked "Exhibit A."

That on or about the 15th day of September, 1885, M. Shaughnessy, A. S. Paddock, M. C. Thum, Boyd Park, and John A. Groesbeck, who owned and represented said other undivided three-fourths of said property, and the said contractual relation existing between plaintiff and defendant, and it being agreed by the plaintiff and defendant that the stock to be subscribed by the defendant in said corporation was in full performance of the said contract between plaintiff and defendant, said other parties and plaintiff and defendant did, at said date last named, enter into an agreement incorporating under the laws of this Territory the Bannock Gold and Silver Mining Company of Idaho, and caused to be conveyed to said company said property in payment of the capital stock of the same.

3 Said articles of agreement and the certificate of incorporation of said company are hereto attached as a part hereof and marked "Exhibit B."

That in entering into said articles of agreement incorporating said company said Egan represented his said one-fourth of said property and said Clasbey represented in said Egan's said one-fourth said $5,000 under said contract, and they were to have one-fourth of the shares of stock of said company, divided between them in proportion of $5,000 to the original cost of said property, viz., $62,500, which would entitle defendant to subscribe for only eight thousand shares and plaintiff to subscribe for seventeen thousand shares of said capital stock in said company; but in drawing up and reducing the agreement or articles of incorporation to writing Arthur L. Thomas, who did so, in the subscription paragraph, in stating fifteen thousand shares of stock to plaintiff and ten thousand shares of stock to defendant, through inadvertence, made a mistake, when in truth and in fact the plaintiff was entitled to subscribe for and own seventeen thousand shares, and the defendant was in truth and in fact only entitled to subscribe for and own eight thousand shares, and the same should have been so written and expressed in said articles of incorporation.

That said excess of defendant's subscription, viz., two thousand shares of stock to said company, belonged and belongs to the plaintiff, the defendant being interested to the amount of only $5,000 in said property representing the capitalization of the stock of said company in the one-fourth thereof aforesaid owned and controlled by the plaintiff, and said property at the time of incorporating said company and transferring the same thereto was estimated at

4 its original cost to be of the value of $62,500, and said plaintiff's one-fourth cost him one-fourth of that amount, and that said property was capitalized and stocked by said corporation into said company at $10,000,000, and divided into 100,000 shares of the par value of $100 per share, and that the first and original cost per share of said stock to plaintiff was 62½ cents per share, and said defendant was only to have shares at that rate for said $5,000, entitling him to only 8,000 shares of said capital stock.

That after said agreement was reduced to writing and read by

said Thomas the plaintiff called their attention to said mistakes and urged that they be corrected and refused to sign said articles of incorporation as they were then written, but said Thomas then stated that to make the correction it would necessitate an erasure and alteration and that would deface the instrument, and suggested that plaintiff could and would, as between themselves, correct said mistakes and arrange the matter thereof and defendant account to plaintiff, so that he would receive seventeen thousand and defendant would only receive eight thousand shares of the said corporate stock of said company; and therefore and in consideration thereof and the premises hereof plaintiff and defendant did agree to and with each other that said mistakes should and would be corrected as between themselves in accordance with the said suggestion of said Thomas, so that the plaintiff would have and receive 17,000 and defendant 8,000 shares of said capital stock; and thereupon and in consideration of the premises hereof and the said premises and agreement of defendant to and with plaintiff that defendant would correct said mistakes as aforesaid agreed to be done and account to plaintiff for and turn over to him said excess of said defendant's subscription, viz., 2,000 shares, the difference between said 8,000 shares which should have been subscribed and said 10,000 shares incorrectly subscribed by defendant, plaintiff did then and there subscribe said articles of incorporation as first written and read as aforesaid.

That at this date the said stock is of the value of three dollars per share, and at the date of the demand hereinafter stated was of value of two dollars per share.

That plaintiff has duly performed the conditions of said contracts on his part, but that defendant has not performed the conditions of the same, but failed and refused and fails and refuses so to do, in that on divers occasions the plaintiff has sought the defendant and conferred with him for the purpose of correcting said mistakes, and demanded that defendant account for and turn over to plaintiff said 2,000 shares of said excess of said stock, but that defendant failed and refused so to do and continues in that default, except he has accounted for and turned over to plaintiff 525 shares of said excess of said 2,000 shares, leaving a balance of 1,475 shares of said stock in the hands of the defendant, of the value of $4,425.00, and wrongfully withheld from him, to the damage of the plaintiff in that sum.

Wherefore the plaintiff demands judgment against the defendant for $4,425.00, with interest from date hereof at the rate of ten per cent. per annum, for all general and proper relief, and for costs of suit.

WM. H. DICKSON,
HALL & MARSHALL,
Attorneys for Plaintiff.

6 "EXHIBIT A."

SALT LAKE CITY, 11*th Sept.*, 1885.

This agreement, entered into on this the eleventh day of September, 1885, by and between Ed. D. Egan, party of the first part, and James T. Clasbey, party of the second part, and both of Salt Lake City and county, Utah Territory:

That said Ed. D. Egan, party of the first part, does hereby agree to deliver to James T. Clasbey, party of the second part, stock in the mining claim at present known as Martin's Horn Silver mine and situated near Lava Beds, Idaho Territory;

The amount of said stock to be of the value of five thousand ($5,000) dollars, at its original cost; and it is further agreed that if said stock is not issued the said Ed. D. Egan, party of the first part, does agree to deliver to said James T. Clasbey, party of the second part, a deed for a portion of the aforesaid mining property, said deed to be equivalent to stock of the amount of five thousand ($5,000) dollars.

E. D. EGAN.
J. T. CLASBEY.

Witness:
H. J. LOVE.

$5,000. SALT LAKE CITY, 11*th Sept.*, 1885.

Received of James T. Clasbey the sum of five thousand ($5,000) dollars.

This sum is in payment for the stock or deed mentioned in an agreement signed by me this day.

E. D. EGAN.

7 "EXHIBIT B."

Articles of Incorporation of the Bannock Gold and Silver Mining Company of Idaho, United States of America.

TERRITORY OF UTAH, }
County of Salt Lake. }

This agreement, made and concluded this fifteenth day of September, 1885, by and between M. Shaughnessy, A. S. Paddock, E. D. Egan, M. C. Thum, Boyd Park, John A. Groesbeck, and James T. Clasbey, witnesseth:

Whereas the undersigned are desirous of associating themselves for the purpose of establishing and conducting a general mining and milling business within the Territory of Idaho and holding property therein and of incorporating for that purpose under and in pursuance of the laws of said Territory of Utah, they do hereby certify, declare and agree as follows—that is to say:

I.

That the said corporation shall be called and known by the name of the Bannock Gold and Silver Mining Company of Idaho, and shall be and is formed and organized at Salt Lake City, Salt Lake county, and Territory of Utah.

II.

That the names of the parties to this agreement, who are
8 the corporators of this incorporation, and their places of residence in full are as follows—that is to say:

M. Shaughnessy, Suffern, Rockland county, New York.
A. S. Paddock, Beatrice, Nebraska.
E. D. Egan, Salt Lake City, Utah.
M. C. Thum, Salt Lake City, Utah.
Boyd Park, Salt Lake City, Utah.
John A. Groesbeck, Salt Lake City, Utah.
James T. Clasbey, Salt Lake City, Utah.

III.

That the corporation herein provided for and hereby created shall exist and continue for the term of fifty years, unless sooner dissolved and disincorporated according to law.

IV.

That the object, business, and pursuit of said corporation is and shall continue to be to carry on and conduct the business of mining and milling ores, of purchasing and selling ores and mines and mining claims, and to construct ditches, flumes, and roadways, and to lease and sell the right to the use of the same, and generally to do all the business and to exercise all the rights incident to a general mining and milling business.

V.

That the place of the general office of said corporation and
9 of the general financial and commercial business thereof shall be at Salt Lake City, Utah.

VI.

That the amount of the capital stock of said corporation shall be ten million dollars, which shall be divided into one hundred thousand shares of the face or par value of one hundred dollars each.

VII.

That the amount of stock subscribed and taken by each of the corporators above named, parties to this agreement, is as follows—that is to say:

M. Shaughnessy, twenty-five thousand shares.
A. S. Paddock, twelve thousand five hundred shares.
E. D. Egan, fifteen thousand shares.
M. C. Thum, twelve thousand five hundred shares.

Boyd Park, twelve thousand five hundred shares.
John A. Groesbeck, twelve thousand five hundred shares.
James T. Clasbey, ten thousand shares.
In all one hundred thousand shares.

VIII.

That the officers of said corporation shall be—
First. A board of seven trustees.
Second. A president.
Third. A vice-president.
Fourth. A treasurer.
Fifth. A secretary.

Said offices of treasurer and secretary may be held by the same person, properly qualified. The president, vice-president, and treasurer shall be trustees.

IX.

That the qualifications of the officers of said corporation shall be as follows—that is to say: To be eligible to the office of trustee, president, vice-president, or treasurer the person must be the owner, as shown by the books of the corporation, of at least one hundred shares of the capital stock of said corporation. A person need not be a stockholder of said corporation to be eligible to the office of secretary thereof.

X.

The following-named parties hereto shall be trustees of said corporation for ten months from the date hereof and until their successors shall have been duly elected at the first regular election of said corporation, as hereinafter provided, and shall have qualified, namely: M. Shaughnessy, A. S. Paddock, E. D. Egan, M. C. Thum, Boyd Park, John A. Groesbeck, and James T. Clasbey; and that the said A. S. Paddock shall be president; the said M. Shaughnessey, vice-president, and the said Boyd Park, treasurer, and Arthur L. Thomas, secretary, for said term of ten months and until their successors shall be duly elected and qualified; and any vacancy caused by the resignation, death, or removal of either or any of said trustees or officers may be filled by the board of trustees.

11 XI.

That the term of office of the officers of said corporation, except as provided in article X as above, shall be one year and until their successors shall be duly elected and shall have duly qualified, unless sooner resigned or removed as hereinafter provided.

XII.

That the annual stockholders' meeting of said corporation for the election of officers and for the transaction of any such other business as shall lawfully come before it shall be held on the first Monday of

June in each year, at Salt Lake City, Utah, at the general office of said corporation, in Salt Lake City, Utah. A representation of a majority of the capital stock of said corporation shall be necessary to legally hold said meeting and all stockholders' meetings of said corporation, either general or special. The officers of said corporation shall be elected by ballot, and the persons receiving a majority of the votes of stockholders at such meeting shall be held and declared to be elected to said offices respectively. Each stockholder shall he entitled to as many votes as he holds shares of said capital stock, and representation by proxy, duly appointed, shall be allowed at all meetings of said corporation, either general or special. The first meeting of said corporation for the election of officers and other purposes, as above provided, shall be held and the first election of officers had at the office of said corporation, in said Salt Lake City, Utah, on the first Monday of June, 1886, and it is hereby provided that a failure to hold said last-named meeting or any general
12 meeting of the stockholders of said corporation at the day appointed for the same shall not forfeit or in — way interfere with the corporate rights acquired under this agreement; but any such meeting may be held at any subsequent time, upon giving thirty days' notice by publication thereof in a daily newspaper published at Salt Lake City, Utah. The secretary shall, or, in case of his failure, any other officer of said corporation may, give thirty days' previous notice of all annual stockholders' meetings by publication thereof as aforesaid, and of all special stockholders' meetings by publication thereof in the same manner, but specifying the purpose or purposes for which any special meeting is called.

XIII.

That any or either of the officers of said corporation may be removed at a stockholders' meeting duly called and held to consider the question of such removal, the holders of a majority of the capital stock of said corporation represented at such meetings, either personally or by proxy, voting for such removal, and either or any of said officers may resign by filing a written resignation in the general office of said corporation, and vacancies caused by any such removal or resignation or by death or disability may be filled by the board of trustees.

XIV.

That the private property of the stockholders of said corporation shall not be liable for the debts and liabilities of the corporation.

XV.

That said corporation shall and does purchase, take, re-
13 ceive and hold the following-described mining property, with appurtenances, privileges, and franchises: The following lodes or mining claims, viz: The Horn Silver lode or mining claim and the Bannock lode or mining claim, both situate in the Lava Creek mining district, Alturas county, Idaho, and both containing

fifteen hundred (1,500) linear feet by six hundred (600) feet in width, and recorded in the office of the county recorder of Alturas county, Idaho, to which record reference is hereby made, in full payment of and for one hundred thousand shares of the capital stock of said corporation, to wit, ten million dollars.

XVI.

The trustees of said corporation, for the purpose of paying expenses, conducting the business, or paying the debts of said corporation, may levy and collect assessments in the manner and form and to the extent hereinafter provided, but no one assessment shall exceed twenty-five cents per share of the capital stock herein provided for, nor shall assessments be levied oftener than once in ninety days.

XVII.

No assessment, as aforesaid, shall be levied except by order of a majority of said board of trustees and not by them unless they personally or by proxy, at the time of such levy, represent a majority of the stock of said corporation; and such levy shall be entered upon the records of the incorporation; but no such assessments
14 shall be levied while any portion of any previous assessment remains unpaid or uncollected, except in cases where all the powers of the corporation have been exercised in accordance with the terms hereof for the purpose of collecting such previous assessment is restrained by injunction or other process, in both which cases a further assessment may be levied and collected according to these articles.

XVIII.

Every order levying an assessment must specify the amount thereof, when, to whom, and where payable, and fix a day subsequent to the full term of publication of the assessment notice on which the unpaid assessments shall be delinquent, which shall not be less than thirty or more than sixty days from the day the stock is declared delinquent.

XIX.

Immediately upon making the assessment the secretary of said corporation shall cause to be published a notice thereof in conformity with these articles, said publication to be made at least once a week for five successive weeks in a newspaper of general circulation published in Salt Lake City, Utah, or in lieu of said publication the said secretary may serve said notice by delivering a copy thereof to each stockholder of said corporation personally.

XX.

If any portion of the assessment mentioned in said notice remains unpaid on the day specified therein for declaring the
15 stock delinquent, the secretary shall, unless otherwise ordered by the board of trustees, cause to be published in the same

paper in which the notice herein provided for shall have been published—or if the publication of them or either of them shall have ceased, then in some other newspaper or newspapers published at the locality—a notice which shall state in substance the levy of the assessment, the stock which is delinquent, the amount due on such delinquent stock, together with the time and place of sale of such delinquent stock, specifying the number of shares upon which assessments are unpaid, with the number of certificate covering said shares, if certificate or certificates have been issued; if not, then the number of shares and amount due thereon, together with the fact that no certificate or certificates have been issued for such shares, which said notice of sale shall be signed by the secretary of said corporation and published for at least sixteen days successively previous to the day of sale in a newspaper published at said Salt Lake City, Utah.

XXI.

By the publication of the notice of sale as aforesaid said corporation shall acquire and have jurisdiction to sell and convey a perfect title to all the stock described in said notice of sale upon which any portion of the assessment or cost of advertising remains unpaid at the hour appointed for said sale, but must sell no more of said stock than is necessary to pay the assessments due and costs of sale. Said sale shall be made by the secretary of said corporation, or such other person as may be appointed by the board of trustees, to the
16 highest bidder, for cash. The person offering at said sale to pay the assessments and costs for the smallest number of shares or fraction of a share shall be deemed the highest bidder, and the stock so purchased shall be transferred to him on the books of the corporation on payment of the assessment and costs. In default of bidders said corporation, by its secretary or any other officer thereof, may purchase said stock at the amount of assessments and costs due thereon, and any stock so purchased by said corporation shall be subject to the disposal of the board of trustees. The time for any sale of delinquent stock as aforesaid may be extended from time to time, not exceeding ten days, by order of the board of trustees, in which case notice of each extension shall be appended to and published with the original notice of sale.

XXII.

No assessment shall be invalidated by reason of any irregularity in either the notice of assessments or notice of sale nor in the sale, but in case of any substantial irregularity such assessments shall stand valid, but publication must begin anew.

XXIII.

The publication of notices required by these articles must be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or other person making such sale shall be *prima facie*

17 evidence of the time and place of said sale, of the quantity and particular description of the stock sold, to whom and for what price sold, and of the fact of the purchase-money having been paid. Said affidavits must be filed in the general office of said corporation.

XXIV.

Said corporation, either in stockholders' meeting or by its board of trustees, may enact a code of by-laws for the regulation and government of its affairs and business, and which shall not be inconsistent with or repugnant to the provisions of these articles nor contrary to law.

XXVI.

Upon a majority vote of the stockholders at a general meeting or a special meeting, called to consider a question, an office may be established outside of the Territory of Utah for the transaction of general business and for the transfer of stock where the transfer and all the corporate and business books of the corporation may be kept; but the general business office and the place for the election of officers and for publication of notices shall be at Salt Lake City, Utah Territory, as hereinbefore specified.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

M. SHAUGHNESSY. [SEAL.]
A. S. PADDOCK. [SEAL.]
M. C. THUM. [SEAL.]
E. D. EGAN. [SEAL.]
BOYD PARK. [SEAL.]
JOHN A. GROESBECK. [SEAL.]
JAMES T. CLASBEY. [SEAL.]

Witness:
HENRY PAGE.
GEO. THACKRAH.

18 (Title of Court and Cause.)

EDWARD D. EGAN, Plaintiff,
vs.
JAMES T. CLASBEY, Defendant. } Summons.

The people of the United States in the Territory of Utah send greeting to James T. Clasbey, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this country; or, if served out of this country, but in this district, within twenty days; otherwise within forty days, or judgment by de-

fault will be taken against you according to the prayer of said complaint.

The said action is brought to recover judgment against you for the sum of $4,425.00, with interest from the 20th day of May, 1886, at the rate of ten per cent. per annum, for all general and further relief, and for costs of suit. The above sum of $4,425.00 is alleged to be due on a certain contract or agreement entered into by and between said plaintiff and said defendant on the 11th day of September, 1885, with reference to certain mining stock in a company thereafter to be formed, and known at the present time as the Bannock Gold and Silver Mining Company of Idaho.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Charles S. Zane, judge, and the seal of
19 the district court of the third judicial district in and for the Territory of Utah, this 22d day of May, in the year of our Lord one thousand eight hundred and eighty-six.

(Signed) J. M. ZANE, *Clerk*,
[L. S.] By H. G. McMILLAN,
Deputy Clerk.

(Title of Court and Action.)

EDWARD D. EGAN, Plaintiff,
vs.
JAMES T. CLASBEY, Defendant. } Answer.

Said defendant, in answer to the complaint herein, denies that he at any time made any other or different contract or agreement with said plaintiff concerning the matter in controversy than that specified in said "Exhibit A," and denies that the original cost of said mining property was $62,500; and denies that the original cost thereof, so far as such fact can or might affect the rights of the parties hereto or the right to or value of the shares of stock in controversy, was any other or greater than $50,000; and denies that he ever agreed or assented to any estimate thereof; and denies that he joined in said incorporation or subscribed for stock of said corporation with any notice or agreement that the cost of said property was $62,500; and denies that under said contract, "Exhibit A," said plaintiff was
entitled to subscribe for 17,000 shares of said capital stock or
20 any greater number of shares that 15,000, or that this defendant was entitled to subscribe for and have only 8,000 of such shares, but, on the contrary, avers that by virtue of said contract and according to the cost of said property, as afterwards ascertained, the defendant was entitled to subscribe for and hold 10,000 of such shares, and said plaintiff was entitled to only 15,000 of such shares, and that plaintiff is precluded by his acts hereinafter mentioned from claiming any more.

This defendant denies that in drawing said agreement, "Exhibit B," said subscriptions of plaintiff and defendant respectively were inserted by mistake, but avers that the cost of said property

and the ratio of division of one-fourth of said capital stock were facts not then known to this defendant and not then settled and agreed upon by the parties hereto.

Said defendant denies that 2,000 or any of the said 10,000 shares of said capital stock subscribed for by him belongs to or ever belonged to said plaintiff; and denies that he is interested only in the amount of $5,000 in said property or in the capitalization thereof, but, on the contrary, avers that the contribution or payment of $5,000 for the purchase of said mining property, as hereinafter more fully shown, entitles him to have against plain- 10,000 shares of the one-fourth of said capital stock, pursuant to said contract, "Exhibit A," and denies that said one-fourth of said mining property cost said plaintiff as much as one-fourth of $62,500; and denies that the cost per share of said stock was 62½ cents per share or any greater price than 50 cents per share after deducting moneys advanced by plaintiff and afterwards refunded to him on his demand, as hereinafter stated; and denies that this defendant by any agreement or otherwise was to have or receive for said $5,000 said shares at the rate of 62½ cents per share, or that he was entitled to only 8,000 of said shares.

21 Defendant denies that he ever agreed to or with said plaintiff that said subscription list should be corrected, so that plaintiff should have or receive 17,000 or any definite number of said shares and this defendant only 8,000 or any definite number thereof, or that said plaintiff subscribed said "Exhibit B" in consideration of any promise of defendant to that effect; and denies that he has not performed or that he has in any particular failed or refused to perform on his part said contract with said plaintiff, and denies that he now fails or refuses to do any act or thing which by law or in equity he ought to do, but, on the contrary, alleges that he has at all times been ready and willing to make a just settlement with plaintiff, and to that end he has agreed with plaintiff to several references of this controversy to different abitrators, which plaintiff has afterwards perversely defeated.

For further defense in this behalf and to show more fully the nature and merits of this case and at the same time setting up his counter-claim against plaintiff, this defendant alleges:

First. That said mining claims and lodes were held originally by one Martin, who had given a bond or an option to purchase, which was held by R. C. Chambers, at $50,000, in addition to $5,000 cash advanced to him on such option.

Second. That in September, 1885, said Shaughnessy (acting for himself and others), jointly with said Paddock and plaintiff, bought and received from said Chambers his said option and received an assignment thereof for $6,000, which was contributed as follows, viz: $3,000 by said Shaughnessy for one-half and $1,500 each by said Paddock and plaintiff for one-fourth each.

Third. Being without means to perfect on his part the purchase from said Martin under said option, said plaintiff applied to defendant to lend him money therefor or to join him in such

22 purchase. This defendant, preferring to contribute to the pur-

chase instead of lending the money, executed said contract, "Exhibit A," with plaintiff, and paid the $5,000 thereunder on the 11th of September, 1885, and thereafter the purchase of said property from said Martin was perfected under said option, the money so contributed by defendant being a part of the $50,000 paid to Martin, but prior thereto other parties had become interested in such purchase and afterwards joined in said corporation.

Fourth. That at the time this defendant delivered to said plaintiff the orders for said 525 shares of said stock he was ignorant of the cost of said property or of such stock and no agreement in respect thereto had been made between them, and this defendant delivered the same not as a conceded right or in settlement of any claim of plaintiff, but on his request, in order to enable him to fulfill contracts of sale made by him; but at the same time defendant was then under the belief, induced by plaintiff's representations, that the cash — of the property was more than $50,000, and such delivery was made subject to adjustment under said contract, "Exhibit A."

Fifth. That at the first meeting of the board of directors of said corporation after its organization this defendant first learned of two claims or items, which the plaintiff now estimates as original cost of said property, viz: A claim of $5,000 by McMasters and Ferguson, middlemen, who claim to have rendered services in procuring said option and sale from Martin; and, second, a claim for $2,000 advanced at said meeting and allowed to said corporation as follows, viz., by said Shaughnessy, $500; by said Paddock, $500; by said plaintiff, $500; by John A. Groesbeck and Boyd Park, $250 each, of which $1,000 was paid by the corporation on said claim of
23 McMasters and Ferguson, and the balance, $1,000, passed to the credit of said corporation for its expenses.

Sixth. Afterwards and towards the close of the year 1885 the said corporation, by consent of the parties who had contributed said sum of $6,000 to pay said Chambers and the fund of $2,000 last aforesaid, repaid to them respectively the sums so advanced by them aforesaid, viz., to said Shaughnessy, $3,500; to said Paddock, $2,000; to said plaintiff, $2,000, and to said Groesbeck and Park, each, $250, and at the same time gave its corporate note to said McMasters and Ferguson for $4,000, at ninety days, which was duly paid and all of such payments were duly made by said corporation out of its net earnings, and said plaintiff received his said portion of $2,000 as so much money advanced to said corporation; yet, while diminishing the dividends that might have otherwise accrued upon all the stock to which this defendant is entitled, he unjustly claims as against the defendant a credit for the same as paid on the purchase of said property.

Seventh. That, deducting the $8,000 so refunded to said contributors as aforesaid and the balance paid to said McMasters and Ferguson by said corporation as aforesaid, the real purchase price and cash of said mining property was $50,000 and the actual cost to plaintiff and defendant of said 25,000 shares of stock was $12,500, or 50 cents per share; for the same said plaintiff advanced and paid the sum of $7,500 and no more, and this defendant the sum of

$5,000; this defendant is entitled to 10,000 shares thereof and plaintiff to 15,000 shares and no more.

Eighth. And, finally, said defendant alleges that after learning the facts aforesaid and the refunding of said moneys to plaintiff and others, and on the 27th day of May, 1886, at the county aforesaid, he demanded from plaintiff the redelivery to him of said 525 shares of said stock, but the plaintiff then and there neglected and refused and still neglects and refuses to return the same; that the said stock was then and is now of the value of $3 per share.

Wherefore this defendant demands judgment against said plaintiff for the sum of $1,575 and costs on his counter-claim; or, if the court shall deem it a proper case on the facts, the defendant prays that an account be taken of the moneys contributed by defendant and plaintiff, deducting all amounts refunded to said plaintiff, also of the stock received by each of them, as well as the value of said stock at the date of defendant's said demand, and that upon such accounting the plaintiff be adjudged to pay to defendant any amount found due him, this defendant hereby offering and being ready and willing to pay any amount which may on such accounting, if any, be found due to said plaintiff, and, finally, that defendant may have such other and further relief as may be just, and that plaintiff be adjudged to pay the costs of this suit.

ROSBOROUGH & MERRITT,
Attorneys for Defendant.

(Title of Court and Action.)

E. D. EGAN, Plaintiff,
vs.
JAMES T. CLASBEY, Defendant. } Findings.

This cause came on to be heard at the present term, and, a jury having been waived by the parties, the same was tried by the court; and the cause, having been heard upon the pleadings and proofs, oral and documentary, of the respective parties and arguments of their counsel, was submitted to the court. The court, having considered all and singular the premises, doth find from the evidence the following facts:

1. The plaintiff and defendant, on the 11th day of September, 1885, entered into the written contract exhibited in the complaint, whereby plaintiff, in consideration of the sum of $5,000, then delivered to him by the defendant toward the purchase of one-fourth undivided of the Martin's Horn silver mine, at Era, Idaho, agreed to deliver to the defendant stock in such mining claim in amount equal to $5,000, at its original cost; and, further, that if such stock was not issued he would deliver to defendant a deed to be equivalent to stock of the amount of $5,000.

2. Plaintiff and others bought an option on said mine, paying therefor $6,000, from one Chambers (such price including $5,000 paid by Chambers to Martin, the owner of the mine, on said option

and $1,000, expenses incurred by Chambers), and on the 12th of September, 1885, paid to Martin $50,000, the balance of the purchase-money.

3. On the 15th of September, 1885, a corporation was organized by the purchasers and others associated with them to work said mine, called the Bannock Gold and Silver Mining Company of Idaho, on a basis of 100,000 shares of capital stock, one-fourth of which (25,000 shares) were to be allotted to plaintiff and defendant, to be divided between them according to their said contract.

4. Plaintiff contributed one-fourth of the $6,000 paid to Chambers and one-fourth of the $50,000 paid to Martin, using, with his own money, the said $5,000 delivered to him by defendant.

5. On the organization of the corporation the mine was
26 conveyed to it, and plaintiff and four other corporators voluntarily loaned and advanced to the corporation $2,000, of which sum the plaintiff contributed $500.

6. Soon after the organization of the corporation, by consent and on motion of the plaintiff, the corporation assumed and paid a debt of $5,000 to one McMasters, which had been incurred by plaintiff and one Thum, the original holders of said option, and afterward the corporation paid a claim for labor on the mine pending the option, which claim was estimated at $1,500, but the amount actually paid thereon to Martin was $2,127, paid by the corporation through plaintiff, its superintendent. The corporation also, in November, 1885, out of its net earnings refunded to the contributors the $6,000 paid to Chambers and the $2,000 advanced as aforesaid, of which the plaintiff received $2,000, the portion advanced by him. The advances and loan thus repaid and debts assumed and paid by the corporation amount to $14,127, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine.

7. Of the $50,000 so paid by the purchasers the plaintiff paid one-fourth, or $12,500 (using for that purpose the $5,000 delivered to him by defendant).

8. The actual original cost of the 25,000 shares of stock was fifty cents per share.

9. When the corporation was about to be organized the plaintiff claimed that the cost of stock was 62½ cents per share, and that he was entitled to subscribe for and hold 17,000 shares and the defendant only 8,000 shares, but there was no agreement or settlement between defendant and plaintiff as to the claim and the matter was left for future adjustment by plaintiff and defendant.

27 10. About the month of December, 1885, defendant, at request of plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which plaintiff desired to give to another person. This stock was delivered to plaintiff subject to the adjustment of their stock account.

11. The parties never agreed upon the cost of the stock. Plaintiff demanded 1,475 shares of stock from defendant, but defendant refused to comply, and plaintiff brought this action. After this, and before answering, defendant demanded of plaintiff the return of the 525 shares delivered as aforesaid, which was refused by plaintiff.

12. The value of said stock when the action was brought and when defendant made his said demand was and is now three dollars per share.

As conclusions of law the court doth find:

1. That the plaintiff was entitled to subscribe for and hold 15,000 shares of said stock, and defendant was entitled to subscribe for and hold 10,000 shares.

2. That plaintiff is not entitled to recover in his action, but the defendant is entitled to judgment against the plaintiff.

3. That on his counter-claim the defendant is entitled to recover from the plaintiff the value of 525 shares of said stock, viz., $1,575, together with his costs, to be taxed.

Let judgment be entered accordingly.

C. S. ZANE, *Judge.*

28 & 29 *Judgment by the Court.*

(Title of Court and Action.)

This cause came on regularly for trial on the twenty-fifth day of October, A. D. 1886, Messrs. Hall & Marshall appearing as counsel for the plaintiff and Messrs. Rosborough & Merritt for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court, sitting without a jury; whereupon the parties each introduced their evidence, both oral and documentary; and, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid,
30 it is ordered, adjudged, and decreed that said defendant have and recover from said plaintiff upon his cross-complaint herein the sum of fifteen hundred and seventy-five (1,575) dollars, together with his costs on this behalf expended, and taxed at the sum of $27.00.

And it is further ordered, adjudged, and decreed that said plaintiff take nothing by his said suit, and that his complaint herein be dismissed.

Judgment rendered October 27th, A. D. 1886.

Notice of Appeal.

(Title of Court and Cause.)

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of Utah Territory from the judgment made and entered in said district court on the 24th day of December, 1886, in favor of said defendant and against said plaintiff and from the whole thereof.

HALL & MARSHALL,
WM. DICKSON,
SHEEKS & RAWLINS,
Attorneys for Plaintiff.

Service of the above notice of appeal admitted this 20th day of January, 1887.

ROSBOROUGH & MERRITT,
Attorneys for Defendant.

31 (Title of Court and Cause.)

It is hereby certified that the foregoing is a full, true, and correct transcript of the record and proceedings in the above-entitled action, which contains a copy of the notice of appeal, the judgment-roll, bill of exceptions, and statement of the case upon which the appellant relies, and that an undertaking on appeal, in due form, has been properly filed in said action.

WM. DICKSON,
SHEEKS & RAWLINGS,
HALL & MARSHALL,
Attorneys for Plaintiff.
ROSBOROUGH & MERRITT,
Attorneys for Defendant.

32 THURSDAY, *February* 3*d*, *A. D.* 1887.

* * * * * * *

EDWARD D. EGAN, Appellant,
vs.
JAMES T. CLASBEY, Respondent. } From 3d Dist.

This cause, coming on regularly for hearing, was argued by Mr. Rawlins, for appellant.

FRIDAY, *February* 4*th*, *A. D.* 1887.

* * * * * * *

EDWARD D. EGAN, Appellant,
vs.
JAMES T. CLASBEY, Respondent. } From 3d Dist.

This cause was further argued by J. B. Rosborough, for respondent—Mr. Rawlins in reply—submitted, and taken under advisement.

SATURDAY, *February* 26*th*. *A. D.* 1887.

A session of the supreme court of Utah Territory was held this day, beginning at two o'clock p. m., pursuant to adjournment.

Present and presiding: The Hon. C. S. Zane, chief justice; present also, the Hon. J. S. Boreman, associate justice, and the Hon.
33 H. P. Henderson, associate justice; the clerk, marshal, and members of the bar.

The record of the last session was read and signed.

* * * * * * *

EDWARD D. EGAN, Appellant,
vs.
JAMES T. CLASBEY, Respondent. } From 3d Dist.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgment of the district court therein be, and is hereby, affirmed, and that respondent have and recover of and from appellant —, his costs herein.

Thereafter said appellant, by his counsel, prayed the allowance of an appeal from this judgment to the Supreme Court of the United States, and asked that the penal sum of supersedeas bond, also of a bond for costs to be given thereon, be now fixed; thereupon it is ordered that the appeal so prayed be, and is hereby, allowed, the amount of the penalty of a supersedeas bond thereon be and
34 is fixed at $3,000.00, and of a bond for costs at $200.00. It is further ordered and declared that the findings of fact of the district court contained in the record be and are adopted and confirmed by this court as the facts in the cause, and the clerk is authorized in transmitting the said record to omit the statement of evidence.

THURSDAY, *March 3d*, 1887.

* * * * * * *

EDWARD D. EAGAN, Apppellant,
vs.
JAMES T. CLASBEY, Respondent. } From 3d Dist.

A supersedeas bond on appeal of this cause to the United States Supreme Court was presented by counsel of appellant and approved by the court.

35 Supreme Court, Territory of Utah.

EDWARD D. EAGAN, Plaintiff & Appellant,
vs.
JAMES T. CLASBEY, Def't & Appellee.

The complaint in this cause avers that on the 11th day of Sept., 1885, the plaintiff was the owner of an undivided one-fourth of the property known as "Martin's Horn silver mine;" that the plaintiff and the other owners of said property having in contemplation the formation of a corporation under the laws of this Territory and passing the title to said property thereto in payment for the stock subscribed by the incorporators thereof, the plaintiff and defendant entered into the following contract:

"SALT LAKE CITY, 11*th Sept.*, 1885.

"This agreement, entered into on this 11th day of September, 1885, by and between Ed. D. Eagan, party of the first part, and James T. Clasbey, party of the second part, and both of Salt Lake City, Utah Territory:

"That said Ed. D. Eagan, party of the first part, does hereby agree to deliver to James T. Clasbey, party of the second part, stock in the mining claim at present known as Martin's Horn silver mine and situated near Lava Beds, Idaho Territory, the amount
36 of said stock to be of the value of five thousand dollars, at its original cost; and it is further agreed that if said stock is not issued the said Ed. D. Eagan, party of the first part, does agree to deliver to said James T. Clasbey, party of the second part, a deed for a portion of the aforesaid mining property, said deed to be equivalent to stock of the amount of five thousand dollars.

"E. D. EAGAN.
"J. T CLASBEY."

That on the 15th day of Sept., 1885, pursuant to such intention, said corporation was formed upon the basis of ten million dollars as the capital stock, divided into one hundred thousand shares of the face or par value of one hundred dollars each; that in forming such corporation it was agreed that said contract between plaintiff and defendant should be recognized, and that defendant should be permitted to subscribe for such amount of said stock as the $5,000 so paid by him would entitle him to under said agreement, and that such subscription should be in full execution of said contract between plaintiff and defendant.

37 That the original cost of said stock was 62½ cents per share, being $62,500.00 in the aggregate for such entire stock; that plaintiff was entitled under said agreement to 17,000 shares of such stock and the defendant to 8,000 shares thereof, being together one-fourth of the entire stock, and that it was agreed between plaintiff and defendant that such was the cost and proper division of such stock.

The complaint further alleges that in drawing up and reducing to writing the said articles of incorporation the person who prepared the same, by inadvertance and mistake, in the subscription paragraph thereof erroneously stated therein the number of shares to said plaintiff as 15,000 and to defendant 10,000 shares; that plaintiff upon hearing said articles read and before executing noticed said error and called the attention of defendant thereto, and that to save delay in redrafting said articles it was agreed between plaintiff and defendant that they would execute said articles as drafted and receive each the number of shares as therein stated, but that
37½ such mistake should be rectified after such stock was issued by defendants assigning and transferring to plaintiff 2,000 shares of such stock; that said articles were executed and said stock issued as set forth therein; that thereafter said defendant transferred to said plaintiff 525 shares of such stock, but refuses to transfer the balance thereof, but has converted to his own use 1,475 shares of such stock, of the value of $3 per share, and demands judgment for the sum of $4,425.00 against defendant.

The answer and counter-claim of the defendant denies the making of any agreement or understanding between plaintiff and defendant except the written contract set forth in the complaint, or

that the original cost of said stock was 62½ cents per share, or that there was any error in drafting said articles of incorporation, or that there was any agreement or understanding to reconvey any portion of said stock, and denies that said plaintiff under said agreement was entitled to 17,000 shares of said stock and said defendant only 8,000 shares thereof; but, on the contrary, avers that the
38 original cost of said stock was only 50 cents per share, being $50,000.00 for the whole thereof; that at the time of making said contract said plaintiff held an executory contract for the purchase of one-fourth of said property, but that being without the means sufficient to make the payments required thereunder he applied to the defendant to contribute $50,000 to the purchase thereof with the understanding that defendant should share in such purchase in such proportion as the $5,000 should bear to the cost of such purchase, and thereupon he paid plaintiff the $5,000.00 and said contract was executed; that thereupon the plaintiff perfected said purchase and at once thereafter said incorporation was formed, but that defendant did not then know the actual cost of such purchase and did not then know what the proper ratio of division of said one-fourth of said stock as between him and plaintiff should be, but that said articles were executed with the understanding that the amount of subscription by plaintiff and defendant was
39 only approximately correct as between them, and that the proper distribution and adjustment thereof was left to future adjustment under their contract; that afterwards and before any such adjustment and before the defendant was aware of the cost of said stock plaintiff requested defendant to assign to him 525 shares of such stock to enable plaintiff to fulfill a contract of sale he had made, and that defendant assigned such stock to plaintiff; that under said contract defendant was entitled to have 10,000 shares of said stock and plaintiff 15,000 shares thereof.

That after learning such fact the defendant demanded of plaintiff 525 shares of said stock, which plaintiff refused, and claimed that the original cost was 62½ cents per share, and that plaintiff included in such original cost certain amounts which were loaned by said plaintiff to said corporation and which said corporation had repaid to him out of its net profits; that such claim was unjust and fraudulent; that the defendant under said contract is entitled
40 to 525 shares of said stock from the plaintiff, which plaintiff has converted to his own use; avers that said stock is worth $3.00 per share, and demands judgment against the plaintiff for the sum of $1,575.00.

The cause was tried before the court without a jury, and the following findings of fact and conclusions of law thereon were found by the trial judge:

"1. The plaintiff and defendant, on the 11th day of September, 1885, entered into the written contract exhibited in the complaint, whereby plaintiff, in consideration of the sum of $5,000, then delivered to him by the defendant toward the purchase of one-fourth undivided of the Martin's Horn silver mine, at Era, Idaho, agreed to deliver to the defendant stock in such mining claim in amount

equal to $5,000, at its original cost; and, further, that if such stock was not issued he would deliver to defendant a deed, to be equivalent to stock of the amount of $5,000.

2. Plaintiff and others bought an option on said mine, paying therefor $6,000, from one Chambers (such price, including
41 $5,000 paid by Chambers to Martin, the owner of the mine, on said option and $1,000, expenses incurred by Chambers), and on the 12th of September, 1885, paid to Martin $50,000, the balance of the purchase-money.

3d. On the 15th of September, 1885, a corporation was organized by the purchasers and others associated with them to work said mine, called the Bannock Gold and Silver Mining Company of Idaho, on a basis of 100,000 shares of capital stock, one-fourth of which (25,000 shares) were to be allotted to plaintiff and defendant, to be divided between them according to their said contract.

4. Plaintiff contributed one-fourth of the $6,000 paid to Chambers and one-fourth of the $50,000 paid to Martin, using with his own money the said $5,000 delivered to him by defendant.

5. On the organization of the corporation the mine was conveyed to it, and plaintiff and four other corporators voluntarily loaned and advanced to the corporation $2,000, of which sum the plaintiff contributed $500.

42 6. Soon after the organization of the corporation, by consent and on motion of the plaintiff, the corporation assumed and paid a debt of $5,000 to one McMasters, which had been incurred by plaintiff and one Thum, the original holders of said option, and afterwards the corporation paid a claim for labor on the mine pending the option, which claim was estimated at $1,500, but the amount actually paid thereon to Martin was $2,127, paid by the corporation through plaintiff, its superintendent. The corporation, in November, 1885, out of its net earnings refunded to the contributors the $6,000 paid to Chambers and the $2,000 advanced as aforesaid, of which the plaintiff received $2,000, the portion advanced by him. The advances and loan thus repaid and debts assumed and paid by the corporation amount to $14,127, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine.

7. Of the 50,000 so paid by the purchasers the plaintiff paid one-fourth, or $12,500 (using for that purpose the $5,000 delivered to him by defendant).

43 8. The actual original cost of the $25,000 shares of stock was fifty cents per share.

9. When the corporation was about to be organized the plaintiff claimed that the cost of stock was 62½ cents per share, and that he was entitled to subscribe for and hold 17,000 shares and the defendant only 8,000 shares, but there was no agreement or settlement between defendant and plaintiff as to the claim, and the matter was left for future adjustment by plaintiff and defendant.

10. About the month of December, 1885, defendant, at request of plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which plaintiff desired to give to

another person. This stock was delivered to plaintiff subject to the adjustment of their stock account.

11th. The parties never agreed upon the cost of the stock. Plaintiff demanded 1,475 shares of stock from defendant, but de-
44 fendant refused to comply, and plaintiff brought this action. After this, and before answering, defendant demanded of plaintiff the return of the 525 shares delivered as aforesaid, which were refused by plaintiff.

12. The value of said stock when the action was brought and when defendant made his said demand was and is now three dollars per share.

As conclusions of law the court finds:

1. That the plaintiff was entitled to subscribe for and hold 15,000 shares of said stock, and defendant was entitled to subscribe for and hold 10,000 shares.

2. That plaintiff is not entitled to recover in this action, but the defendant is entitled to judgment against the plaintiff.

3. That on his counter-claim the defendant is entitled to recover from the plaintiff the value of 525 shares of said stock, viz., $1,575, together with his costs, to be taxed."

Judgment was rendered accordingly, and after motion for
45 new trial the plaintiff appealed to this court from the judgment and order denying the motion for new trial.

The only question raised in this court by the appellant is that the pleadings and findings of fact do not warrant the judgments, but that upon the facts found the judgment in favor of defendant should be set aside and judgment rendered for the plaintiff thereon for the amount of his claim.

We think that the findings do not warrant the claim of the plaintiff, but that they are conclusive against him. We think it sufficient to recall the fact that the findings expressly determine as matter of fact that the cost of said property to plaintiff and the other purchasers was $50,000, and "that the original cost of the 25,000 shares of stock was fifty cents per share," and that there was never any agreement between the parties as to the cost or distribution of said shares between them, but that it was left to the future adjustment of their stock account under the contract. It is contended by the plaintiff
that the term "original cost" in the contract should be con-
46 strued to mean its entire cost to plaintiff, and that the findings show that its cost was more than fifty cents per share. The findings of fact go upon the idea that the advances by plaintiff over fifty cents per share were not a part of the cost, but that they were loans made by plaintiff to the corporation, and that the plaintiff so treated it himself. If it was not a loan, then it was a gross fraud upon defendant and other holders of stock to have it refunded to him as such. We have no doubt that the term "original cost" as used in said contract was intended by the parties to mean its cost to the plaintiff, but advances or loans made to the corporation which the plaintiff has treated and had refunded to him by the corporation out of its property as such cannot be regarded as a part of such cost. The plaintiff cannot use it for the double purpose of depleting the treasury and divisible assets of the association and at the same

time use it as a charge to the holders of stock as a part of its cost.

We think it was proper for the court to leave him where he
47 had placed himself in the transaction and estop him from charging such loans to defendant as a part of the cost of the stock. The judgment and order appealed from should be affirmed with costs to defendant.

Zane, C. J., concurs,
Boreman, justice, concurs.

Filed Feb'y 26th, 1886.

E. T. SPRAGUE, *Clerk.*

SHEEKS & RAWLINS,
For Appellant.
ROSBOROUGH & MERRITT,
For Respondent.

A true copy of the original.
Attest: E. T. SPRAGUE, *Clerk.*

48 Know all men by these presents that we, James Hogle and John R. Sands, are held and firmly bound unto James T. Clasby, appellee, in the full and just sum of three thousand two hundred dollars, to be paid to the said James T. Clasby, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a term of the supreme court of Utah Territory, in a suit depending in said court between Edward D. Egan, as appellant, and James T. Clasby, as respondent, judgment was rendered against said appellant and in favor of said respondent, and the said appellant having in open court, immediately after the rendition of said judgment, applied for and obtained the allowance of an appeal by said court from said judgment to the Supreme Court of
49 the United States, and the said supreme court of said Territory at the time of allowing said appeal having fixed the amount, as hereinbefore mentioned, for which a bond should be given as security for costs and damages on said appeal:

Now, the condition of the above obligation is such that if the said appellant shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his appeal or plea good, then the above obligation to be void; else to remain in full force and virtue.

E. D. EGAN. [SEAL.]
JAMES HOGLE. [SEAL.]
JOHN R. SANDS. [SEAL.]

Sealed and delivered in presence of—
J. L. RAWLINS.

Approved by—
C. S. ZANE,
Chief Justice of Supreme Court, Utah.

Endorsed: Filed March 3d, 1887. E. T. Sprague, clerk.

50 TERRITORY OF UTAH, } ss:
Salt Lake County, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the cause of Edward D. Egan, appellant, *vs.* James T. Clasbey, respondent, do return hereto attached a transcript of the record, excepting the evidence, of the proceedings, the opinion, and bond on appeal in and of said court and cause to the Supreme Court of the United States, and I hereby certify that said attached transcript is a true, full, and correct copy of said record, evidence excepted, said proceedings, opinion, and bond on file or of record in my office.

In witness whereof I hereto set my hand and the seal of said supreme court of Utah Territory this 15th day of September, A. D. 1887, at Salt Lake City.

Seal Supreme Court, Territory of Utah, United States of America.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 117. Edward D. Egan, appellant, *vs.* James T. Clasbey. Filed September 26, 1887.

Office Supreme Court U. S.
FILED.
OCT 31 1890
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 117.

EDWARD D. EGAN, APPELLANT,

vs.

JAMES T. CLASBEY.

BRIEF FOR APPELLANT.

J. L. RAWLINS,
Attorney for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 117.

EDWARD D. EGAN,
Appellant,
vs.
JAMES T. CLASBEY.

Appeal from the Supreme Court of the Territory of Utah.

STATEMENT OF THE CASE.

This action was brought to recover the value of 1475 shares shares of mining stock claimed by plaintiff to have been received by defendant, in excess of the number of such shares to which defendant was entitled, under the following agreement:

"*Salt Lake City, 11th September, 1885.*

"This agreement entered into on this the 11th day of September, 1885, by and between Ed. D. Egan, party of the first part, and James T. Clasbey, party of the second part, and both of Salt Lake City and County, Utah Territory.

"That said Ed. D. Egan, party of the first part, does hereby agree to deliver to James T. Clasbey, party of the second part, stock in the mining claim, at present known as Martin's Horn Silver Mine, and situated near Lava Beds, Idaho Territory.

"The amount of said stock to be of the value of five thousand ($5,000) dollars, at its original cost And it is further agreed that if said stock is not issued, the said Ed. D. Egan, party of the first part, does agree to deliver to said James T. Clasbey, party of the second part, a deed for a portion of the aforesaid mining property, said deed to be equivalent to stock of the amount of five thousand ($5,000) dollars.

ED. D. EGAN.

"Witness: H. J. LOVE. J. T. CLASBEY."

"$5,000. *Salt Lake City, 11th September, 1885.*

"Received of James T. Clasbey the sum of five thousand ($5,000) dollars.

"This sum is in payment for the stock or deed mentioned in an agreement signed by me this day.

E. D. EGAN."

Two thousand was the alleged excess of shares first received by the defendant, but he afterwards returned to plaintiff 525 shares, and the latter constituted the basis of the counter claim.

The value of the shares ($3 each); the terms of the agreement; the right of plaintiff and defendant to subscribe for and receive one-fourth of the entire capital stock in consideration of the conveyance by plaintiff of his one-fourth interest in the mines to the corporation; that, as between plaintiff and defendant, this one-fourth of the stock or mining interest was to be divided by virtue of the agreement, in the ratio which $5,000 is to the entire original cost of the stock or mining interest, the right of which had been acquired by plaintiff, and so to be divided between him and defendant; and that defendant refused to surrender to plaintiff such excess of shares received by him, are facts not in dispute upon the pleadings.

In regard to the time and manner of the performance of the agreement on the part of the plaintiff, it is alleged in the complaint, and not denied in the answer, that on the 15th day of September, 1885, the parties "who owned and represented said other undivided three-fourths of said property, and the said contractual relation existing between plaintiff and defendant, and it being agreed by the plaintiff and defendant that the stock to be subscribed by the defendant in said corporation was in full performance of the said contract between plaintiff and defendant, did at said date last named enter into an agreement, incorporating under the laws of this Territory the Bannock Gold and Silver Mining Company of Idaho, and caused to be conveyed to said Company said property in payment of the capital stock of the same."

Of the 25,000 shares to be divided between plaintiff and defendant, it is admitted upon the pleadings that, at the date of the corporate organization, defendant obtained 10,000 shares. In the complaint it is alleged that at the time of subscribing the stock, defendant agreed to turn over 2,000 shares to plaintiff. This agreement is denied in the answer, wherein it is alleged that the understanding was that the division of shares was agreed to be left open for future settlement.

The Court below found the following facts:

1. The plaintiff and defendant, on the 11th day of September, 1885, entered into the written contract exhibited in the complaint, whereby plaintiff, in consideration of the sum of $5,000, then delivered to him by the defendant toward the purchase of one-fourth undivided of the Martin's Horn Silver Mine, at Era, Idaho, agreed to deliver to the defendant stock in such mining claim in amount equal to $5,000, at its original cost; and further, that if such stock was not issued he would deliver to defendant a deed to be equivalent to stock of the amount of $5,000.

2. Plaintiff and others bought an option on said mine, paying therefore $6,000, from one Chambers (such price including $5,000 paid by Chambers to Martin, the owner of the mine, on said option, and $1,000 expenses incurred by Chambers), and on the 12th of September, 1885, paid to Martin $50,000, the balance of the purchase-money.

3. On the 15th of September, 1885, a corporation was organized by the purchasers and others associated with them to work said mine, called the Bannock Gold and Silver Mining Company of Idaho, on a basis of 100,000 shares of capital stock, one-fourth of which (25,000 shares) were to be alloted to plaintiff and defendant, to be divided between them according to their said contract.

4. Plaintiff contributed one-fourth of the $6,000 paid to Chambers, and one-fourth of the $50,000 paid to Martin, using, with his own money, the said $5,000 delivered to him by defendant.

5. On the organization of the corporation, the mine was conveyed to it, and plaintiff and four other corporators voluntarily loaned and advanced to the corporation $2,000, of which sum the plaintiff contributed $500.

6. Soon after the organization of the corporation, by consent and on motion of the plaintiff, the corporation assumed and paid

a debt of $5,000 to one McMasters, which had been incurred by plaintiff and one Thum, the original holders of said option, and afterward the corporation paid a claim for labor on the mine pending the option, which claim was estimated at $1,500, but the amount actually paid thereon to Martin was $2,127, paid by the corporation through plaintiff, its superintendent. The corporation also, in November, 1885, out of its net earnings, refunded to the contributors the $6,000 paid to Chambers, and the $2,000 advanced as aforesaid, of which the plaintiff received $2,000, the portion advanced by him. The advances and loan thus repaid, and debts assumed and paid by the corporation, amount to $14,127, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine.

7. Of the $50,000 so paid by the purchasers the plaintiff paid one-fourth, or $12,500 (using for that purpose the $5,000 delivered to him by defendant.)

8. The actual original cost of the 25,000 shares of stock was fifty cents per share.

9. When the corporation was about to be organized the plaintiff claimed that the cost of stock was 62½ cents per share, and that he was entitled to subscribe for and hold 17,000 shares and the defendant only 8,000 shares, but there was no agreement or settlement between defendant and plaintiff as to the claim, and the matter was left for future adjustment by plaintiff and defendant.

10. About the month of December, 1885, defendant, at request of plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which plaintiff desired to give to another person. This stock was delivered to plaintiff subject to the adjustment of their stock account.

11. The parties never agreed upon the cost of the stock. Plaintiff demanded 1,475 shares of stock from defendant, but defendant refused to comply, and plaintiff brought this action. After this, and before answering, defendant demanded of plaintiff the return of the 525 shares delivered as aforesaid, which was refused by plaintiff.

12. The value of said stock when the action was brought and when defendant made his said demand, was, and is now, three dollars per share."

The real point in issue upon the pleadings is in regard to the original cost of the 25,000 shares of stock which were to be divided between plaintiff and defendant. Plaintiff alleged it to be 62½ cents per share, defendant that it was 50 cents per share and no more.

We insist that the claim of the plaintiff is correct, and that a judgment in his favor as prayed in his complaint is the necessary legal consequence of the facts found by the court below, together with the facts admitted upon the pleadings, and upon a proper interpretation of the contract, and that the court below erred in not so finding.

ARGUMENT.

The contract should be construed with reference to its subject matter and the surrounding circumstances at the time it was entered into.

The subject matter contemplated which defendant was to receive for the $5,000 advanced by him to plaintiff, was an interest in certain mining property to be evidenced either by stock in a corporation or by a deed.

This mining interest in the one form or the other was to be delivered by plaintiff to the defendant to the amount of $5,000 at its original cost. It was an executed contract on the part of the defendant. His part of it was entirely performed by the payment of the $5,000. It was executory on the part of the plaintiff, as he alone under it was the person to procure and deliver to the defendant, mining stock or interest in satisfaction or to the amount of $5,000 at original cost. The contract necessarily meant the cost to plaintiff of that interest. Cost is used here as distinguished from market value. And original cost means the cost price to the plaintiff of the thing to be delivered at the time of delivery. The phrase, original cost, precluded the idea that the rights of the parties should be dependent upon the ultimate value or cost, or the future fluctuations in the value or cost of the thing after the time fixed for its delivery.

Both the parties when they put their money into this adventure, did it doubtless with the belief that eventually they would get it all back again and more; that the ultimate cost to them would be nothing. If either of them had supposed otherwise, it is safe to say that he would not have engaged in the enterprise.

To suppose that these parties intended by their agreement that plaintiff would deliver stock to defendant to the amount of $5,000, at what it might eventually cost him, and that the full performance of the agreement must depend upon and await the final result of this mining speculation, would be a palpable absurdity; for unless we suppose that plaintiff knew when he advanced his money and incurred this obligation to defendant, that he would never get it back again, that it would be lost, he must have known that his agreement with defendant would be impossible of performance.

If the ultimate cost to him (as he must have supposed) would be nothing; if all he put in he would get back again, the final cost to him would be nothing; and as no aggregate of nothings could be $5,000, he would forever be unable to fulfill his agreement.

It must follow then, that what the parties intended by original cost was the cost incurred by plaintiff at or before the time of performance or delivery.

What was to be the time of performance? Upon the pleadings it is admitted that "full performance" was to take place at the date of the corporate organization and subscription of stock therein. This, too, is in evident harmony with the intent and purpose of the contract. Before that time the risk, control, responsibility and costs pertaining to the one-fourth of the mines, devolved upon the plaintiff. After that time the full ownership and right, control, ceased to be in the plaintiff individually, but was vested exclusively in the corporation. Therefore the costs incurred in its management, would be those of the corporation, and not those of the plaintiff.

This time was fixed by the parties, and performance then actually took place by defendant obtaining from plaintiff, through the corporation, at least all the stock to which he was entitled under the contract according to his own admission.

That being settled as the time fixed by the parties, and full performance of the contract having then taken place, the contract as such became *functus officio*, and the rights of the parties fixed and no contract or arrangement afterwards made between plaintiff and the company, could affect the existing rights between plaintiff and defendant under this contract. Such contract can only be considered in this case for the purpose of ascertaining whether defendant did not then receive a surplus of stock belonging to the plaintiff without consideration, which in equity and good conscience he ought to return to plaintiff.

It must be, with reference to that time and the conditions then existing, that we are to now do what the parties themselves then ought to have done—ascertain what amount of stock at its original cost—cost to plaintiff at that time, defendant was then entitled to receive in satisfaction of $5,000. If the parties had then taken time and stopped to figure up the items of such cost, what items, according to the claims now made by the parties, would have been properly included or excluded in fixing the aggregate? What may have transpired after that time can no more be considered now by the court, than then by the parties. Subsequent transactions are wholly irrelevant upon this issue of original cost. They are only pertinent as to ultimate cost, which the parties, by their agreement, expressly excluded from consideration.

Applying the maxim, that that was done which ought to have been done, and that defendant received stock, in an accordance with the amount of plaintiff's cost incurred in respect to this property, as such cost would have been estimated at that time, would not all functions of the contract, having been thus fully performed, have ceased? If, after that, either of the parties had obtained money or property belonging to the other, it is not clear that the rights of the parties would be determined solely with reference to the particular transaction, and without regard to their former and obsolete agreement? If so, is it not equally clear here, when the parties fixed with absolute certainty the time with reference to which their rights were to be ascertained?

The term cost must mean the cost to plaintiff. The agreement referred to no other person, to whom it could apply. The general cost would be market value. This clearly was not intended. In Buck vs. Buck, 18 N. Y., 337, it was held that an agreement by a merchant to deliver goods at cost price, means the price they cost him, without reference to depreciation or actual market value at the time the goods are called for.

Webster defines cost "the amount paid, charged, or engaged to be paid, for anything bought or taken in barter; charge expense."

In the case of Goodwin vs. the United States, 2 Wash., C. C., 499, Justice Washington, speaking with reference to the usual meaning of the terms "prime cost" and "actual cost" of goods, at time and place of exportation, with reference to which duties were to be fixed under an act of Congress, says: "What then constitutes the actual cost of an article at any particular place, which is purchased there for the purpose of being exported, and which is actually exported? The answer is, the price given, and every charge which attend the purchase and the exportation, paid or supposed to be paid, at the place where the article is exported. The actual cost of a bale of goods purchased at Liverpool, is composed of the price paid for it, or, in other words, the prime cost and charges, including commission on the purchase, the packages, if any, and if the goods were purchased at the manufactory, then it includes not only the prime cost and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others. What is the meaning of the market price, or value of an article at the place of exportation? The answer is, the price at which such articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale." He, however, held that it appeared from other provisions of the statute that the terms "actual cost" was not used according to its ordinary meaning, but in the sense of actual value, and

among the reasons given for so holding in this case, was that Congress, after using the words actual cost, expressly provided that it should include all charges, commissions, etc., saying? "Now, if the actual cost of the article at the place of exportation essentially includes all subsequent charges incurred at that place, including circumstances, etc., and if the market price of the article at that place does not include them then it would seem that it was unnecessary to declare that to the real cost there should be added all charges, if the real cost, as opposed to the market price, was intended."

Under the agreement the defendant was to take stock to the limit of $5,000, at a rate which should be sufficient to indemnify the plaintiff for procuring and delivering it to him.

Ripley vs. Mosely, 57 Me., 76, is a well considered case upon the subject of indemnity. Under the bond in that case, the defendant undertook to indemnify the plaintiff against damages and expenses incurred in defending a suit, and the Court held that in the amount to be paid by the defendant to the plaintiff should be included the debt contracted by the plaintiff to counsel, for services in defending the suit against him, though not yet paid.

A merchant agreeing to sell his stock of merchandise at cost would undoubtedly be entitled to include as part of the cost, not only the money actually paid, but also what he was liable to pay for them.

We arrive at these conclusions:

1. The stock should be estimated at what it had cost the plaintiff at the time of its delivery to the defendant—that is, the date of the corporate organization.

2. In estimating the cost, there should be included not only what the plaintiff had actually paid, but debts which he had contracted to pay, though yet not paid at that time.

According to the findings of the Court below, plaintiff had then paid in cash the one-fourth of $56,000, or $14,000. That plaintiff and Thum then owed a debt of $5,000 to McMasters, incurred by them in respect to these mines. As plaintiff and Thum alone, under the findings at that time, shared this obligation, we are, at least, entitled to credit the plaintiff with $2,500 on this account. There was then due men for work upon the mine prior to that time $2,127, one-fourth of which plaintiff, as owner of one-fourth of the property, was legally liable to pay. The exact existing liability against plaintiff on that account at the time the stock was delivered was $531.71.

These items aggregate $17,031.75, which represent the original

cost to plaintiff of 25,000 shares of stock. In round numbers this would be at the rate of 68 cents per share. As appears from the 9th finding of fact, at the time of performance of the contract plaintiff claimed that the stock cost him at the rate of 62½ cents per share, and, while this was not expressly assented to, it was not then disputed by defendant. It probably never would have been disputed had the stock not greatly appreciated in value.

At the time of delivery of the shares, and at the organization of the Company, the time when the contract was to be fully performed, and in fact was performed, it is not found, nor is there any pretense that any one had undertaken to save plaintiff harmless from any item included in the foregoing estimate of cost.

It will be seen that we have not included the $500 afterwards loaned to the corporation by plaintiff, as found in the fifth finding of fact.

It is not found that any of the items we have included were loans by plaintiff, to be returned to him with or without interest.

This idea is plainly excluded in the finding, which carefully distinguish between advances and loans.

The only obligation the corporation assumed at its organization, in consideration of the convevance to it of the mines, was that incidental to the issuance of the stock to the subscribers. This appears from the pleadings and Article XV. of Exhibit "B," annexed to the complaint—that is, that the profits should be apportioned to the subscribers according to the stock they respectively held.

This being so at the date of the organization of the corporation, defendant received at least 2,000 shares belonging to plaintiff, which it was his duty immediately, or upon demand, to return to him. The right of plaintiff to these shares in the hands of defendant accrued then. Has anything accrued since to cancel or destroy this right? It is not pretended that plaintiff ever gave, or intended to give, them to defendant. No express agreement between plaintiff and defendant, with or without consideration, is found or pretended, by which the former released his right to these shares to the latter.

But it is found that some time after the corporate organization the Company assumed and paid, at the request of the plaintiff, the debt which he owed to McMasters and the miners. It is not found that this was in consideration that he would release his right to the shares in question to Clasbey, the defendant, or that the latter was in any way privy to the arrangement. According to this finding, the debt of plaintiff was still uncancelled. He thereby ceased to owe it to McMasters and the miners, but continued to owe it to the

Company, because it is well settled that one person paying out money for the benefit of another, at his request, in the manner found in this case, may recover it back again.

4 Waits. Act. & Def., 449.

Nor will any disallowance of these items in this action, to which the corporation is not a party, preclude the latter from recovering this money, if it has not yet been paid.

As we have seen, after performance of the contract, the parties were at arm's length, and either plaintiff or defendant was at liberty to make any business arrangement favorable to himself, without complaint on the part of the other. So, in regard to the plaintiff's portion of the $6,000 paid to Chambers, and refunded by the Company in November, some two months after the time with reference to the rights of these parties, should be settled.

It is not found or pretended that the defendant was privy to it, or that the receipt of the money was accompanied by the condition, or with the understanding, with any one, that the right to the stock in the hands of the defendant was thereby released.

If this money had been distributed as a dividend, defendant's portion would not have been more than $480, according to the stock which he should have received September 15, 1885.

If this were a wrong on the part of plaintiff, either to the corporation or to the defendant, it was a wrong for which the law afforded an adequate—a commensurate remedy—not a remedy out of all proportion to the wrong. The obligation implied by law (there being no express agreement) was a return of the money, with interest, by plaintiff.

There was nothing in the nature of an estoppel in the transaction to preclude plaintiff from disputing the right of defendant to convert to his own use plaintiff's property, then of the value of thousands of dollars. Say plaintiff got $480 of defendant's money, has the Court the right for that reason to decree a transfer of plaintiff's property to the defendant of the value of $6,000, as the Court has done in this case? Suppose we reverse the situation. Suppose in November the stock had become worthless by depreciation, as might well have been the case, the plaintiff, having received this money, as found in this case, and the defendant or the corporation had demanded its return, would the plaintiff have had a right to say, as defendant now says, "No; I will not pay you the money under our agreement—you were to take stock at original cost, and for this money you shall have stock at that rate?"

Now, the obligations of the agreement were mutual. If the

defendant would not have been bound to accept the stock in the case supposed, he cannot demand it in the case at bar.

Is it not plain that the rights of the parties to the stock must be settled as of the date of the corporate organization, and that their rights thereto cannot be regarded as shifting back and forth according to future fluctnations or change of circumstances? If so, judgment upon the findings and pleadings should be directed by this court in favor of plaintiff, as prayed in his complaint, and against the defendant upon his counter claim.

J. L. RAWLINS,

Attorney for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 117.

EDWARD D. EGAN, APPELLANT,

vs.

JAMES T. CLASBEY, RESPONDENT.

BRIEF FOR RESPONDENT.

SAMUEL A. MERRITT,
Attorney for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 117.

EDWARD D. EGAN,
Appellant.
vs.
JAMES T. CLASBEY,
Respondent.

Appeal from the Supreme Court of Utah Territory.

BRIEF FOR RESPONDENT.

THE CASE.

The District Court on its findings gave judgment for defendant below, and on appeal the Supreme Court of the Territory affirmed the judgment, not making any other findings, but thus adopting the findings of the District Court.

This appeal is from the judgment roll alone, no exceptions being exhibited in the record; and the cause stands here upon the sufficiency of the pleading and findings to sustain the judgment.

It appears from the findings:

1st. That the parties entered into their contract on the 11th September, 1885, in contemplation of the purchase thereafter of an interest in the Horn Silver mine, and the organization of a mining corporation to work the same, pursuant to which respondent delivered to appellant $5,000, to be used in such purchase, and appellant agreed to deliver to him stock in such corporation "in amount equal to $5,000 at its original costs," and that, if such stock should not be issued, he would deliver to him a deed for a portion of the property equivalent to such stock.

2nd. That appellant and others bought an option on the mine from one Chambers for $5,000, and on the 12th September, 1885, accomplished the option by paying to the owner $50,000 balance of purchase money.

3rd. That the proposed corporation was organized on the 15th of September, 1885, on a scheme of 100,000 shares, one-fourth of which were to be allotted to appellant and respondent, to be divided between them according to their contract.

4th. That appellant contributed one-fourth of such monies, using with his own the $5,000 contributed by respondent.

5th. The mine was thereupon conveyed to the corporation, and four of the corporators loaned to it $2,000, of which appellant contributed $500.

6th. Soon thereafter the corporation, on motion of appellant, who was one of its directors, assumed and paid a debt of $5,000 to one McMasters, which had been incurred by appellant and one Thum, who were the original holders of such option, and also paid a debt of $2,127 incurred for exploitation of the mine, pending the option; and in November, 1885, out of its net earnings, refunded to the contributors the $5,000 paid to Chambers and the $2,000 loaned as aforesaid, the amount of debts, loans and advances paid being $14,127, the appellant being thus reimbursed his advances and loans, and being relieved of his debt of $5,000.

7th. The balance of the purchase money not so paid, being $50,000, was paid to the owner (Martin), one-fourth of which ($12,500) was paid by appellant, he using for that purpose the $5,000 intrusted to him by respondent.

8th. The actual original cost of the 25,000 shares of stock was fifty cents per share, or $12,500.

9th. It seems that when the stock was issued appellant received 15,000 shares and respondent 10,000 shares, but appellant claimed that the cost of the stock was 62½ cents per share, and that he was entitled to 17,000, which respondent disputed, and that matter was left unsettled.

10th. In December, 1885, respondent at request of appellant delivered to him 500 shares to enable him to fill a sale and 25 shares which he wanted to give to some one, all subject to adjustment of their stock account.

11th. The parties failing to agree, appellant demanded of respondent 1,475 shares, which was refused, and the latter demanded of the former 525 shares, which was refused, and thereupon the action and counter-claim was moved.

12th. The value of the stock at the time of said transactions is admitted by the pleadings and found by the court below, was $3 per share.

RESPONDENT'S POINTS.

This is a case of resulting trust, in which the appellant assumed the duties and obligations of a trust which equity will enforce.

It is not a case of loan of money, that is admitted in appellant's brief.

It was not a purchase of an interest in the mine by respondent from appellant; appellant owned no interest in it when he contracted with respondent on 11th September, 1885, and received the $5,000. He alleges in his bill that "on or about" that date he was the owner of one-fourth, undivided, of the mine; but it clearly appears that the purchase of the mine from Martin was not made till the next day (12th September), and that appellant used for that purpose the $5,000 entrusted to him by respondent. It is manifest from the contract between the parties and their subsequent acts, as well as from the findings of the court below, that the $5,000 was delivered by respondent to the appellant before the purchase, but in contemplation of the purchase of an interest in the mine, and that such purchase

should, in part, be made with this $5,000 and for their mutual benefit in the ratio of their actual cash outlays for that purpose.

Now the real and only question in this case is what was the actual cost of the one-fourth, or 25,000 shares of stock under the manipulations of the appellant while he was acting under the obligations of trustee for respondent? It is not a question of how much the property cost the corporation, first and last. It is not a question between the corporation and these parties, or either of them.

As between these parties, in order to arrive at the actual cost of the stock, the court below properly omitted the $5,000 debt of appellant and Thum to McMasters, the $6,060 paid to Chambers for the option, the $2,000 loaned by appellants and other corporators, and the $2,175 debt incurred for exploitation of the mine, pending the option, for all those items were paid and refunded by the corporation, *i. e.* by all the stockholders, respondent as well as the rest, in ratio of their respective interests.

It is to be noted that appellant also acted as trustee in another capacity: he was one of the board of directors of the corporation. It was at his instance and on his motion, a short time after its organization, the company paid his and Thum's debt of $5,000 to McMasters, and the $2,175 debt incurred in working the mine before purchase and pending the option, and refunded to the contributors the $6,000 paid to Chambers, and the $2,000 loaned to the corporation. On receipt of his portion of these rebates, the appellant was out $12,500, including the $5,000 of respondent; that is he paid and laid out $7,500 and respondent $5,000, which, at the cost price thus shown, would entitle him to 15,000 shares and respondent to 10,000 of the 25,000 shares.

As a sample of bizarre logic and strabismal equity, the attention of the court is invited, in this connection, to the claim urged by appellant that he should be allowed a credit, as against respondent, for one-fourth of the $6,000 paid Chambers, one-fourth of the $2,175 mining expenses, and half of his $5,000 debt to McMasters, and that these items, all of which had been allowed and paid or refunded by the corporation, should be allowed as part of the cost of the 25,000 shares.

The $5,000 owed by appellant and Thum was assumed and

paid by the corporation; he was thus relieved from it at the expense of the corporation, *i. e.* of all the stockholders, and yet he makes that the basis of a claim of $2,500 (half of $5,000) as part of the cost paid by him for the $25,000 shares. Such a ridiculous claim was never allowed by a court of equity, and it requires some audacity to urge it, though the code of ethics which prevails among some manipulators of mining corporations might justify it as a fashionable vice.

The respondent, confiding in appellant's honesty, put money in his hands to invest in the purchase, and appellant assumed the obligations of a trustee in that behalf, and was bound to observe the utmost good faith. He conducted the business. He reimbursed himself out of the net profits of the corporation (being a director at the time) for all his outlays and debts above the $7,500, as against respondent's $5,000, and all this without agency or consent of the latter; and by these acts he is estopped from claiming that he contributed any more than that sum towards the actual cost of the 25,000 shares.

The court below properly found against the appellant on his claim; these findings are unimpeached, and that judgment should be affirmed.

RESPONDENT'S COUNTER-CLAIM.

The findings of the court below are conclusive on the counter-claim. It sufficiently appears that the 500 and the 25 shares were delivered by respondent to appellant at his request, not as due him, but as an accommodation to enable him to fill a sale and make a present, and subject to an adjustment of their stock account; that appellant, being entitled to 10,000 of the 25,000 shares, had recieved only what he was entitled to hold, was entitled, on adjustment of the stock account, to demand the 525 shares, and, on refusal, to recover their value, which is admitted to be $3 per share, or $1,575, the amount of his judgment.

SAMUEL A. MERRITT,
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